

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR 11-3749-TUC-CKJ(LAB)
Plaintiff,)	REPORT AND RECOMMENDATION
vs.)	
Kurt Allen Hankes,)	
Defendant.)	

The District Court referred this case to the Magistrate Judge for a hearing on the defendant's motion to suppress evidence for violations of the Fourth Amendment. The defendant, Kurt Allen Hankes, argues that all evidence obtained from the search of his home on September 28, 2011 must be suppressed because it was conducted by the probation officer without a warrant, probable cause, or reasonable suspicion in violation of his Fourth Amendment rights. (Doc. 46, 57). He also argues that because the federal search warrant relied on the unlawful probation search, all evidence seized by federal agents must be suppressed as the fruit of the poisonous tree.

An evidentiary hearing was held on November 29, 2012.¹ The witnesses who testified

¹On that date, the government had not yet disclosed the grand jury transcript of Agent Brandt's testimony. The parties asked the Court to defer issuing its R & R until the transcript was disclosed. (Doc. 81, pp. 142-143). The Court was to be advised of the disclosure. Upon inquiry on 1/3/12, the Court was advised that the transcript was disclosed on 12/11/12.

were Pima County Adult Probation Officer Martha Esquivel; Alcohol, Tobacco, and Firearms (ATF) Special Agent Creighton Brandt, and ATF Supervisory Special Agent Rick Serrano.

Charge:

The defendant is charged by indictment in Count 1 with possession of ammunition by a convicted felon, in violation of Title 18 United States Code §§ 922(g)(1) and 924(a)(2), and in Count 2 with possession of an explosive by a convicted felon, in violation of Title 18 United States Code §§ 842(i)(1) and 844(a)(1).²

Motion to Suppress Evidence:

The defendant argues that his Fourth Amendment rights were violated when his home was searched by the probation officer without reasonable suspicion, probable cause, or a warrant. He claims that any evidence obtained as a result of the illegal search, including the evidence found by federal agents who secured a search warrant based on the evidence obtained during the probation search, must be suppressed.

The Court concludes the initial search by the probation officer did not require probable cause or a warrant. It required only reasonable suspicion and authorization by a condition of probation. The Court finds, however, there was no reasonable suspicion, rendering the initial search unreasonable within the meaning of the Fourth Amendment. The search warrant based on the initial unlawful search is not valid. Therefore, the evidence seized pursuant to the warrant is inadmissible in the government's case-in-chief.

EVIDENCE:

Martha Esquivel

Martha Esquivel is a Pima County Adult probation officer. (Doc. 81, p. 7). Part of her duties is to conduct random home visits of the probationers she supervises to verify that they are in compliance and to monitor their progress. (Doc. 81, p. 8). Probationers are informed that they may be subject to random home visits, which can involve searches. (Doc.

²The government has agreed to dismiss Count 2. (Doc. 41, p. 3, n. 3).

1 81, p. 9). If the probation officer suspects suspicious activity, she has the right to conduct
2 a search of the residence unannounced, and she does not need a warrant. (Doc. 81, p. 9).
3 When a probation officer has information that might warrant a search, she consults with a
4 search team coordinator and a supervisor to get approval. (Doc. 81, p. 10). When probation
5 officers are supervising probationers, they are “duty bound” to act on information they
6 receive in order to protect the public. (Doc. 81, pp. 10-11).

7 Officer Esquivel was supervising Kurt Hanks when she participated in a search of
8 his home on 9/28/11. (Doc. 81, p. 11). At the time she began supervising Mr. Hanks, Ms.
9 Esquivel reviewed with him condition 5, which says that he must submit to search and
10 seizure of his person or property by the probation department without a search warrant.
11 (Doc. 81, p. 13).

12 Mr. Hanks’ ex-girlfriend called Ms. Esquivel and informed her that she was sure that
13 Mr. Hanks had weapons in his home, and she feared for her safety. (Doc. 81, p. 13). The
14 ex-girlfriend had not been in Mr. Hanks’ home for months. (Doc. 81, p. 29). Having
15 weapons was a violation of Mr. Hanks’ probation. (Doc. 81, p. 14).

16 Ms. Esquivel received calls from an FBI agent and an ATF agent regarding the
17 allegation by the ex-girlfriend. She also discussed the situation with her supervisor. (Doc.
18 81, p. 14). Ms. Esquivel was concerned about the information but also was concerned about
19 whether the allegation was true because Mr. Hanks and his ex-girlfriend were in a volatile
20 relationship and a custody battle over their baby. (Doc. 81, pp. 14-15, 29). The woman had
21 made allegations in the past and then retracted her statements. (Doc. 81, p. 15). Ms.
22 Esquivel’s probation notes from 9/28/11 at 9:30 am state that Agent Brandt called and told
23 her that the ex-girlfriend, Gayle Grant, retracted her allegation and no longer believed there
24 were weapons in the home, but because of Mr. Hanks’ paranoia, he might have a handgun
25 in his room by the bed. (Doc. 81, pp. 120-121).

26 Initially, Ms. Esquivel considered conducting a random home visit the next day, but
27 after speaking with her supervisor, she decided to conduct a search. (Doc. 81, p. 16). She
28 told an agent from the FBI or ATF of her intention. The agent asked if she could wait a few

1 days, but whether to search now or later was her decision to make subject to her supervisor's
2 approval. (Doc. 81, p. 16). Other than the allegation from the ex-girlfriend, Ms. Esquivel
3 had no concerns about Mr. Hanks. (Doc. 81, p. 39). Searches, however, may be conducted
4 regardless of whether the probationer is compliant or not. (Doc. 81, p. 48). It is Ms.
5 Esquivel's understanding that no level of suspicion is needed to conduct a full search of a
6 probationer's home. (Doc. 81, pp. 50-51).

7 The morning of the search, the ex-girlfriend called and recanted her allegations. Ms.
8 Esquivel consulted with the search team. They decided to conduct the search because they
9 were ready to go and wanted to confirm whether the information about weapons in Mr.
10 Hanks' home was true or not. (Doc. 81, p. 18). The probation office has a policy to
11 respond any time there is any allegation involving weapons or drugs, even from an
12 anonymous source. (Doc. 81, pp. 38-39). Mr. Hanks was contacted the morning of the
13 search and advised that the probation officer was coming to his home. He was cooperative
14 and came home, at which time he was advised that the home would be searched. (Doc. 81,
15 p. 19). Mr. Hanks was handcuffed for officer safety and was walked inside the home. The
16 search began. (Doc. 81, p. 20). Ms. Esquivel sat with Mr. Hanks in the kitchen during the
17 search as part of the normal procedure. (Doc. 81, p. 20).

18 The search was a full search. Mr. Hanks was not asked for his consent. The search
19 team consisted of 6 probation officers. Ms. Esquivel did not believe they would find
20 anything at the home. (Doc. 81, pp. 40-41). Were it not for the office policy, Ms. Esquivel
21 would not have conducted the search. (Doc. 81, p. 45).

22 The search revealed some ammunition and some type of explosive. Per normal
23 procedure, the sheriff's department was called. ATF Agent Creighton Brandt was also
24 notified. (Doc. 81, pp. 21-22). ATF agents said they were taking over and probation was
25 free to leave. (Doc. 81, p. 22).

26 **Creighton Brandt**

27 Creighton Brandt is a special agent with ATF. (Doc. 81, p. 54). Agent Brandt
28 received information from his supervisor, Rick Serrano, that an Assistant Special Agent in

1 charge of the Tucson FBI office advised him that Hanks, on felony probation, might possess
2 firearms or ammunition. (Doc. 81, pp. 54-55). After speaking with Martha Esquivel, Agent
3 Brandt made contact with the source of the information, Gayle Grant, who stated she
4 believed Mr. Hanks had firearms and ammunition in a storage facility and possibly a gun
5 at his home. (Doc. 81, pp. 56-57). ATF decided not to act on the information, but Agent
6 Brandt called Monica Esquivel and told her that if she did a home inspection and found
7 anything that would constitute a violation, she could call him if she needed help. (Doc. 81,
8 p. 58).

9 When Agent Brandt was told that probation located ammunition and suspected
10 explosives, that information was used to obtain a search warrant. (Doc. 81, pp. 59-60). The
11 affidavit in support of the warrant relied exclusively on information provided by probation
12 and not on any information from Ms. Grant. (Doc. 81, p. 61).

13 Agent Brandt went into the house to make contact with Mr. Hanks at about 3:00
14 p.m., before the warrant was signed by the judge at 8:40 p.m. (Doc. 81, p. 70). An Oro
15 Valley detective was already on the scene. (Doc. 81, pp. 70-71). When Agent Brandt
16 entered the house, a few items were pointed out to him, but he went directly to speak with
17 Mr. Hanks and did not look through the house until the search warrant was obtained. (Doc.
18 81, p. 72). His report states that he did a visual inspection of the found ammunition before
19 contacting Mr. Hanks. (Doc. 81, p. 73). The search warrant affidavit does not tell the judge
20 that Agent Brandt had entered the house before securing the warrant. (Doc. 81, p. 110). He
21 did not base the affidavit on any of his own personal observations. (Doc. 81, p. 115).

22 Sergeant Christopher Rogers of the Pima County Sheriff's Department bomb squad
23 was in the house before Agent Brandt and probably did some kind of inspection. (Doc. 81,
24 pp. 92-93). Other than the probation officers, no other law enforcement conducted a search
25 prior to obtaining the search warrant. (Doc. 81, p. 110).

26 **Rick Serrano**

27 Rick Serrano is a supervisory special agent with ATF. (Doc. 81, p. 127). Agent
28 Serrano received a telephone call from FBI Agent Daneka Dedus. (Doc. 81, p. 129). Agent

1 Dedus explained that two weeks earlier, a woman stopped by the office and reported a person
2 on probation in possession of a large number of firearms. (Doc. 81, pp. 128-129). Agent
3 Serrano contacted Mr. Hanks' probation officer, Monica Esquivel. (Doc. 81, p. 129). He
4 planned to look into the information and determine how to proceed. (Doc. 81, p. 130).
5 Agent Serrano assigned the case to Agent Brandt. (Doc. 81, p. 131). Agent Serrano believed
6 they had probable cause to search Mr. Hanks' home based on the information from the
7 informant given to the FBI agent and Monica Esquivel, as well as Agent Brandt's
8 observations at the residence during the search. (Doc. 81, pp. 132-133). Agent Serrano was
9 very clear with Ms. Esquivel that he was not directing the probation officer to conduct a
10 search. (Doc. 81, pp. 139-140).

11 **DISCUSSION:**

12 Defendant Hanks argues that the Fourth Amendment requires that the probation
13 officer have reasonable suspicion to search a probationer's home and that a tip from an
14 unreliable informant cannot form reasonable suspicion. He claims that if the probation
15 search was in violation of the Fourth Amendment then all evidence discovered as a result of
16 the federal search warrant must be suppressed because the warrant was based on evidence
17 found during the unlawful search.

18 The government argues that a probation officer is authorized to search a person and
19 his property without a search warrant, probable cause, or reasonable suspicion. No level of
20 suspicion is required.

21 The Fourth Amendment requires that a search be conducted based on a warrant unless
22 an exception is proven by the state. *California v. Carney*, 471 U.S. 386, 390, 105 S.Ct. 2066,
23 2068 (1985). The lawfulness of a search is based on the totality of the circumstances. *U.S.*
24 *v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981). When the search is of a
25 probationer's home, the warrant requirement is relaxed, but the search still must be
26 reasonable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 and 879-80, 107 S.Ct. 3164, 3168, 3171-
27 72 (1987). A warrantless search satisfies the Fourth Amendment where there is both
28 reasonable suspicion and a probation condition that authorizes a warrantless search. *U.S. v.*

1 *Knights*, 534 U.S. 112, 112-22, 122 S.Ct. 587, 592-93 (2001).

2 Reasonable suspicion requires specific articulable facts that form the basis for
3 particularized suspicion when considered with objective and reasonable inferences. *United*
4 *States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc). Reasonable
5 suspicion is a less demanding standard than probable cause and may be supported by less
6 reliable information. *U.S. v. Rowland*, 464 F.3d 899, 907 (9th Cir. 2006), citing *Alabama v.*
7 *White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416 (1990). It depends on the content of the
8 information and the degree of reliability, which are both considered in the totality of the
9 circumstances analysis. *Id.* More information is required to establish reasonable suspicion
10 if the tip has a low degree of reliability. *Id.*

11 In determining the reliability and veracity of an informant's tip, the totality of the
12 circumstances must be considered. *U.S. V. Villasenor*, 608 F.3d 467 (9th Cir. 2010). The
13 court should consider a number of factors. A known informant is more reliable than an
14 anonymous informant. *Rowland*, 464 F.3d at 907. An informant who has a history of
15 reliability is more reliable than an unproven informant. *Id.* at 908. The tip is more reliable
16 if the basis of the informant's knowledge is known. *Id.* Predictive information about future
17 events that is corroborated by police observation or involves a person's intimate affairs that
18 could not be observed by the general public may be considered reliable, especially if it relates
19 to suspicious activities rather than innocent conduct. *Id.*

20 Mr. Hanks' probation condition number 5 states that he must submit to search and
21 seizure of his person or property by the adult probation department without a search warrant.
22 The probation officer, Monica Esquivel, testified that if she suspected suspicious activity she
23 could conduct a search of the home without a warrant.

24 The decision to search Mr. Hanks' home was based on information provided by
25 Gayle Grant, Mr. Hanks' ex-girlfriend, that he had weapons in his home, in violation of his
26 probation. The informant's identity was known. Her history of reliability however was
27 questionable. She had made allegations in the past and then retracted them. She and Mr.
28 Hanks were in a volatile relationship and a contentious child custody battle. Prior to the

1 search of the home, Ms. Esquivel was informed that Ms. Grant retracted her accusation. Ms.
2 Grant did not provide the basis of her knowledge and had not been in Mr. Hanks' home for
3 months. She provided no predictive information. The informant's information was not
4 reliable and did not rise to the level of reasonable suspicion.

5 The information from the unlawful probation search was the sole basis for the search
6 warrant obtained by the ATF agents. The Fourth Amendment's exclusionary rule applies to
7 evidence that is obtained by means of an illegal search. *Wong Sun v. U.S.*, 371 U.S. 471,
8 484-88, 83 S.Ct. 407, 415-18 (1963). There is a clear causal connection between the illegal
9 conduct and the evidence the defendant seeks to suppress. *See U.S. v. Crawford*, 372 F.3d
10 1048, 1054 (9th Cir. 2004).

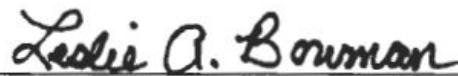
11 **RECOMMENDATION:**

12 In view of the foregoing, it is recommended that, after its independent review of the
13 record, the District Court **GRANT** the motion to suppress evidence.

14 Government's counsel may serve and file written objections within 14 days. If
15 objections are not timely filed, the parties' right to de novo review may be waived. No reply
16 shall be filed unless leave is granted from the District Court.

17 The Clerk of the Court is directed to send a copy of this Report and Recommendation
18 to all parties.

19 DATED this 9th day of January, 2013.

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24 Leslie A. Bowman
25 United States Magistrate Judge
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